

FEDERAL MAGISTRATES COURT OF AUSTRALIA

PARK & ANOR v MINISTER FOR IMMIGRATION & ANOR [2009] FMCA 7

MIGRATION – Review of Migration Review Tribunal decision – refusal of partner visas – adverse credibility findings by the Tribunal – disclosure of adverse information by the Tribunal – whether the Tribunal breached s.359A of the *Migration Act 1958* (Cth) considered – interpretation errors at the Tribunal hearing – whether the Tribunal breached s.360 of the *Migration Act* considered – whether further hearing required to deal with adverse information emerging after the hearing considered.

Migration Act 1958 (Cth), ss.5, 91R, 359, 359A, 360, 424A, 425
Migration Regulations 1994 (Cth)

Applicant NAAF of 2002 v Minister for Immigration (2004) 221 CLR 1
Coco v AN Clark (Engineers) Ltd (1968) 1A IPR 587; [1969] RPC 41
Corrs Pavey Whiting & Byrne v Collector of Customs (Vic) & Anor (1987) 14 FCR 434
Kumar v Minister for Immigration [2008] FCAFC 67
MZXBQ v Minister for Immigration [2008] FCA 319
Perananthasivam v Telstra Corporation Limited [2007] FMCA 1261
Perera v Minister for Immigration [1999] FCA 507; (1999) 92 FCR 6
SZBEL v Minister for Immigration (2006) 228 CLR 152
SZBYR v Minister for Immigration (2007) 235 ALR 609
SZGWN v Minister for Immigration [2008] FCA 238
SZILQ v Minister for Immigration [2007] FCA 942
SZIZO v Minister for Immigration [2008] FCAFC 122
Wright v Gasweld Pty Ltd (1991) 22 NSWLR 317

First Applicant: JUNG MEE PARK

Second Applicant: YOUNG YEON HWANG

First Respondent: MINISTER FOR IMMIGRATION & CITIZENSHIP

Second Respondent: MIGRATION REVIEW TRIBUNAL

File Number: SYG1358 of 2008

Judgment of: Driver FM

Hearing dates: 3 & 27 November 2008

Date of Last Submission: 27 November 2008

Delivered at: Sydney

Delivered on: 12 February 2009

REPRESENTATION

Counsel for the Applicant: Ms B Nolan

Solicitors for the Applicant: Carroll & O'Dea

Counsel for the Respondents: Ms L Clegg

Solicitors for the Respondents: Sparke Helmore

ORDERS

- (1) A writ of certiorari shall issue quashing the decision of the Migration Review Tribunal signed on 24 April 2008 and handed down on 30 April 2008.
- (2) A writ of mandamus shall issue requiring the Migration Review Tribunal to redetermine the application before it according to law.

FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
SYDNEY

SYG 1358 of 2008

JUNG MEE PARK
First Applicant

YOUNG YEON HWANG
Second Applicant
And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction and background

1. This is an application to review a decision of the Migration Review Tribunal (“the Tribunal”). The decision was handed down on 30 April 2008. The Tribunal affirmed a decision of a delegate of the Minister not to grant the applicants Partner (Residence)(Class BS) visas. The applicants before the Tribunal were the principal applicant (Ms Jung Mee Park) and her son. Both Ms Park and Mr Hwang were applicants

in the proceedings before this Court. References in this judgment to “the applicant” are to the principal applicant, Ms Jung Mee Park.

2. The following statement of background facts is derived from the applicant’s submissions filed on 28 October 2008.
3. The applicant was born in Korea in 1959. She came to Australia on 19 March 2001.
4. The applicants applied to the Department of Immigration and Citizenship for a Partner (Residence)(Class BS) visas on 24 April 2003. The delegate refused to grant the visas on 25 January 2007 and notified the applicants of the decision by letter dated the same day. The applicants applied to the Tribunal on 6 February 2007 for review of delegate’s decision.

The issue before the Tribunal

5. The issue before the Tribunal was whether the primary applicant was the spouse of the sponsor at the time of the decision.
6. In this case the sponsor and the applicant were in a de facto relationship. As the Tribunal notes (court book “CB” 568) it was required to be satisfied that there was a mutual commitment to a shared life as husband and wife to the exclusion of all others, that the relationship was genuine and continuing, and that the couple lived together, or did not live separately and apart on a permanent basis: reg 1.15A(1A)(b) and 1.15A(2)(c) of the *Migration Regulations 1994* (Cth) (“the Regulations”). In the case of a de facto relationship, the Tribunal was required to be satisfied that these circumstances existed for the 12 months immediately preceding the day of application unless the applicant could establish compelling and compassionate circumstances for the grant of the visa: regs.1.15A(2)(d) and 1.15A(2A)(b) of the Regulations.
7. In forming an opinion whether two persons were in a de facto relationship the Tribunal was required to have regard to all the circumstances of the relationship, including and in particular considerations set out in reg.1.15A(3) which include, in particular:

- (a) *the financial aspects of the relationship, including:*
 - (i) *any joint ownership of real estate or other major assets;*
and
 - (ii) *any joint liabilities; and*
 - (iii) *the extent of any pooling of financial resources,*
especially in relation to major financial commitments;
and
 - (iv) *whether one party to the relationship owes any legal*
obligation in respect of the other; and
 - (v) *the basis of any sharing of day-to-day household*
expenses;
- (b) *the nature of the household, including:*
 - (i) *any joint responsibility for care and support of children,*
if any; and
 - (ii) *the parties' living arrangements; and*
 - (iii) *any sharing of responsibility for housework;*
- (c) *the social aspects of the relationship, including:*
 - (i) *whether the persons represent themselves to other people*
as being married or in a de facto relationship with
each other;
 - (ii) *the opinion of the persons' friends and acquaintances*
about the nature of the relationship; and
 - (iii) *any basis on which the persons plan and undertake*
joint social activities;
- (d) *the nature of the persons' commitment to each other,*
including:
 - (i) *the duration of the relationship; and*
 - (ii) *the length of time during which the persons have lived*
together; and
 - (iii) *the degree of companionship and emotional support*
that the persons draw from each other; and
 - (iv) *whether the persons see the relationship as a*
long-term one.

8. The Tribunal conducted a hearing on 24 August 2007 and took evidence from the applicant, her son, her claimed de facto husband (Mr Kim) and six other witnesses. After the hearing¹, the Tribunal wrote to the applicants pursuant to s.359A of the Migration Act. The applicant responded by letter dated 7 December 2007². The Tribunal

¹ On 27 November 2007, CB 325

² CB 327

sent a further letter under s.359A on 25 January 2008³ and also requested further information pursuant to s.359 of the Migration Act. The Tribunal received a response on 25 February 2008⁴.

9. The Tribunal in its decision, while satisfied that Ms Park and Mr Kim lived together in a de facto relationship, was not satisfied that they had had a mutual commitment to a spousal relationship for 12 months prior to the date of the visa application. The Tribunal based its conclusion on adverse credibility findings arising from inconsistencies and contradictions that the Tribunal saw in the evidence it received from the applicant and her witnesses.

The application and evidence

10. These proceedings began with a show cause application filed on 27 May 2008. The applicants now rely upon a further amended application filed in court by leave on 27 November 2008. The grounds in that application are:

1. *The Migration Review Tribunal ("The Tribunal") failed to comply with s359A of the Migration Act 1958 (Cth) ("the Act") and thereby constructively failed to exercise its jurisdiction.*

PARTICULARS

- (1) *The Tribunal erred by failing to provide clear particulars of the information provided to the Department of Immigration and Citizenship on 22 August 2003 and 20 December 2006 in accordance with the decision in Kumar v Minister for Immigration and Citizenship [2008] FCAFC 67.*
- (2) *The Tribunal erred by failing to provide clear particulars of the information which form annexures A, B and C to the affidavit of Megan Louise Palmer dated 21 November 2008 as they would have been the reason, or a part of the reason, for affirming the decision that was under review obligation as at the time they came to the Tribunal's attention.*

³ CB 331

⁴ CB 337

2. *The Tribunal failed to comply with the requirement of s 360 of the Act and thereby constructively failed to exercise its jurisdiction and, further and/or in the alternative the Tribunal took into account irrelevant considerations.*

PARTICULARS

- (1) *The language interpretation of the questions asked by the Tribunal member were erroneous and or misleading and confusing so that response to questions asked by the Member were incorrect or irrelevant.*
 3. *The Tribunal failed to comply with the requirement of s 360 of the Act and thereby constructively failed to exercise its jurisdiction.*
 - (1) *By failing to put to the applicants an element of evidence which purportedly emerged after the hearing, being the information obtained from ..., the primary applicants' alleged business partner in a Karaoke venture regarding the alleged nature of her partnership in the business, in respect of which the applicant had not been given an opportunity to give evidence and present arguments at an oral hearing. It seems that this information was before the Tribunal prior to the hearing yet was not put to her at the hearing, it formed the subject of the s 359A letter.*
11. I have before me as evidence the court book filed on 18 August 2008. I also received as evidence an affidavit by Mira Kim, a NAATI accredited translator and interpreter, made on 10 October 2008, to which is annexed an Auscript transcript of the hearing conducted by the Tribunal on 24 August 2007 and an interpreting checking report prepared by Ms Kim. I accepted that Ms Kim was qualified to give opinion evidence in relation to the interpretation conducted at the Tribunal hearing and I accepted as factual evidence her translations of what was said in the Korean language reproduced in her checking report.
12. I also received an affidavit by Megan Louise Palmer made on 21 November 2008, to which were annexed documents omitted from the court book.

13. At the trial of this matter on 27 November 2008 counsel for the Minister read a second affidavit by Ms Palmer made on 21 November 2008 to which was annexed an envelope containing documents said to be confidential and in respect of which the Minister sought a non publication order. I ordered that:

Access to the envelope marked “Confidential Documents”, attached to the affidavit of Megan Louise Palmer, sworn and filed on 21 November 2008, be restricted to the parties’ legal representatives, pending further order of the Court.

Submissions

14. Counsel for both the applicants and the Minister prepared extensive written submissions. They also made oral submissions. In relation to the asserted breach of s.359A of the Migration Act the applicants’ submissions are:

On 25 January 2008, the Tribunal sent the applicants an “Invitation to comment on/ respond to information” (CB 331) (“the s 359A letter”). Paragraph 9 of the letter reads (CB 334)

On 22 August 2003 and 20 December 2006 the Department of Immigration and Citizenship was informed by members of the community that your relationship with Mr Kim was contrived for immigration purposes.

This is relevant because it is open to the Tribunal to find that your evidence and Mr Kim’s evidence is incorrect. This may lead the Tribunal to conclude that you and Mr Kim are not witnesses of truth. This may also lead the Tribunal to conclude that you and Mr Kim are not in a genuine and continuing spousal relationship and decide to affirm the decision not to grant a Partner (Residence) (Class BS) visa.

It is noted that this information was the basis for the field visit to the applicant’s home: see delegate’s decision at CB 254.

In Kumar v Minister for Immigration and Citizenship [2008] FCAFC 67, Besanko J (with whom Tamberlin and Finn JJ agreed), when referring the use of a “dob-in letter” in the context of s 359A, said at [61]:

It follows that the information, including the identity of the informant, was not non-disclosable information. The

Tribunal failed to comply with s 359A in that it did not disclose to the appellant the identity of the informant and the full nature of the information. Its failure to do so gave rise to jurisdictional error: *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294.

Further, it is noted that the language of s 359A is prospective: SZBYR v Minister for Immigration and Citizenship (2007) 235 ALR 609. It is the quintessential procedural fairness provision contained in the Division: *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294. The fact that the Tribunal had no regard to the letter's contents does not undermine the Court's ability to grant relief. *SZIZO v Minister for Immigration and Citizenship* [2008] FCAFC 122 makes plain that the Court must be cautious when faced with colloquial notions of no practical unfairness that it is not in a position to determine whether without the breach, the outcome would have been no different.

15. In relation to the asserted breach of s.360 of the Migration Act based upon alleged interpretation errors, counsel for the applicants draws attention to a series of apparent problems in interpretation during the course of the hearing conducted by the Tribunal. Counsel also draws upon annexure C to the affidavit of Mira Kim in order to demonstrate that interpretation problems caused confusion in the evidence. Counsel relevantly submits:

The above in themselves would stand to warrant the allegation of error on the basis of the factors which Kenny J in Perera v Minister for Immigration and Multicultural Affairs [1999] FCA 507; (1999) 92 FCR 6 said (at 41) should be taken into account in assessing competency of the interpreter. These include:

"the responsiveness of the interpreted answers to the questions asked, the coherence of those answers, the consistency of one answer with another and the rest of the case sought to be made and, more generally, any evident confusion in exchanges between the Tribunal and the interpreter ..."

The Tribunal was put on notice of this alleged inadequacy in the course of the hearing. The statutory obligation under s 360 to "invite" the applicants to appear before it to give evidence and present arguments lay with the Tribunal. It is a continuing obligation: Applicant NAAF of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 221 CLR 1 at

[26]-[27]. Despite being on notice of the potential errors in the interpretation it extended no such invitation to the appellant to attend a further hearing so that he could give evidence, with adequate interpretation. The failure by the appellant to ask for a further hearing did not affect that obligation. See SZGWN v Minister for Immigration & Citizenship [2008] FCA 238 at [47].

In this case the question is whether the standard of interpretation by the interpreter was such that the applicants and their witnesses were prevented from giving their evidence effectively or at all.

The applicants note the observations of Ryan J (with whom Tamberlin and Middleton JJ agreed) in WALN v Minister for Immigration and Multicultural and Indigenous Affairs [2006] FCAFC 131 at [29]:

To succeed on this ground the appellant must establish that he was effectively prevented from giving his evidence; see Perera (above) at [38]–[41]. Alternatively, he must establish that errors had occurred in translation which were so material as to cause the decision-making process to miscarry; see *Soltanyzand v Minister for Immigration and Multicultural Affairs* [2001] FCA 1168, at [18]. Those authorities were applied in *Appellant P 119 of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) FCAFC 230 and *WACO Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 511, at [63]–[68].

Further, the applicants note the observations of Kenny J in Perera at [29]:

"Whilst the interpretation at a Tribunal hearing need not be at the very highest standard of a first flight interpreter, the interpretation must, nonetheless, express in one language, as accurately as that language and the circumstances permit, the idea or concept as it has been expressed in the other language."

As has already been adverted to above the adequacy of the standard of interpretation in this case is evidenced by factors such as the unresponsiveness and coherence of translated answers, the consistency of answers with the questions asked and with the rest of the applicants' (in particular the primary applicant's) case generally and the frequent presence of evident confusion in exchanges between the Tribunal and the interpreter or the interpreter and the primary applicant and the interpreter

and her sponsor. More importantly, the evidence which has emerged from the relevant exchanges above instances went to central issues in the application. The evidence which emerged from the exchanges was either plainly wrong or misconstrued. This evidence ultimately informed part of the Tribunal's reasons for affirming the decision under review.

In contrast to Kenny J's remarks in Perera at [39] this is a case like Kfoury v Minister for Immigration, Local Government and Ethnic Affairs (unreported, Olney J, 8 July 1994) in which the Minister conceded that the interpretation relied on in reaching the relevant decision was incorrect. It is like R v Saraya (1993) 70 A Crim R 515 in which there was expert evidence of deficiencies in the interpretation. On the basis of that evidence (admitted on appeal), the appellate court held that it was satisfied that those deficiencies had prevented Saraya from giving "an effective account of the facts vital to his defence": (1993) 70 A Crim R 515 at 516 per Badgery-Parker J. In this respect the Tribunal by taking into account incorrect answers as a consequence of incorrect interpretation the Tribunal has taken into account irrelevant material: see SZBYL v Minister for Immigration Multicultural and Indigenous Affairs (2005) 219 ALR 707 at [9].

Moreover, the deficiency of interpretation in this case was cumulatively of such poor quality that the applicants (especially the primary applicant) were effectively deprived of their right to appear pursuant to s 360: see for example, VWFY v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 1723 per Finkelstein J, particularly at [24] - [27] and SZGWN per Gilmour J at [19] - [21]; [34], [37] and [43] - [45]. This is an error which goes to the Tribunal's constructive exercise of its jurisdiction.

16. The applicants also assert a breach of s.360 of the Migration Act because of the failure by the Tribunal to put to the applicants at a hearing information obtained from a person known to the applicants which is contained in the confidential exhibits envelope. The applicants rely upon the decision of the Federal Court in *SZILQ v Minister for Immigration* [2007] FCA 942 at [32] where Buchanan J said:

However, in my view, the principles stated in SZBEL about the operation of s 425(1) of the Act are nevertheless of some relevance to the issues which arise for consideration in this appeal. On the authority of SZBEL, where a matter is one of 'the issues arising in relation to the decision under review' s 425(1) of the Act requires an invitation to appear 'to give evidence and

present arguments relating to' the issue. The question of the appellant's motivation was obviously an issue in the case because, although he evidently wished his claimed practice of Christianity in Australia to be taken into account, s 91R(3) required his conduct in Australia to be disregarded unless he satisfied the RRT about his motivation. The opportunity to give evidence and present arguments at an oral hearing was not afforded in the present case in relation to that issue. The RRT took the view, following the Full Court decision in SZEPEZ, that it was not necessary to conduct a further oral hearing because, as the review was a continuing one despite the earlier decision being set aside, a hearing had already been held. However, that mistakes the nature of the obligation under s 425(1). The RRT itself found it necessary to take a further step to comply with s 424A after the earlier decision was set aside. An additional element then emerged, in respect of which the appellant had not been given an opportunity to give evidence and present arguments at an oral hearing. In those circumstances the obligations under s 425(1) were not fully met.

17. Counsel took me to pages 13 and 14 of the Auscript hearing transcript in which the applicant was asked about her employment in Australia. The s.359A letter sent to the applicants referred to that evidence and also to the "records of the Department" to suggest that the applicant had been untruthful in that evidence. The Tribunal in its reasons made an adverse finding against the applicant in relation to that evidence and her response to the s.359A letter. Counsel submits that it is now apparent that the reference to the "records of the Department" in the s.359A letter is a reference to "dob in" material contained in the confidential exhibits to Ms Palmer's affidavit which was not raised at the Tribunal hearing and which was "clearly dispositive" of the application before the Tribunal.
18. In relation to the first two grounds of review the Minister submits as follows:

Alleged breach of s.359A

The Minister formally submits that Kumar v Minister for Immigration & Citizenship [2008] FCAFC was wrongly decided. The Minister successfully sought special leave to the High Court to appeal Kumar, and the appeal is pending. The Minister accepts that the Court is bound by the Full Court's decision in Kumar.

However, Kumar can be distinguished from the facts of this case for the reasons set out below.

Section 359A(4)(c) applies

The first is that the confidential ‘dob-in’ information is subject to the exception in s 359A(4)(c). In Kumar, substantial attention was devoted to the exception in s 359A(4)(c). That provision, together with the definition of ‘non-disclosable’ information in s 5 of the Act bear the result that s 359A(1) obligations are not invoked where the informant could ‘found’ an action for breach of confidence against the Minister in the event that the confidential information was disclosed. In Kumar, the Full Court held that the exception in s 359A(4)(c) had no application because the informant did not have clean hands (or the Minister would have had available to him the ‘iniquity defence’ in such an action): see redacted version of Kumar at [2], [52] – [58]. That is not the case here. There is no suggestion that the informants have unclean hands in the present case.

Here, there is no reason why the elements of an action for breach of confidence could not be made out by the informants: see Kumar (as redacted) at [53] and the elements referred to therein by reference to Corrs Pavey Whiting & Byrne v Collector of Customs (1987) 14 FCR 434. The Court does not need to affirmatively conclude that an action for breach of confidence would be successful in order to find that the exception in s 359A(4)(c) is invoked. The words ‘would found an action’ must be taken to mean ‘capable of supporting an action’, or capable of supporting a prima facie case.

Section 359A(1) permitted the non-disclosure on the facts of this case

Second, it is contended that Kumar may not necessarily stand for the proposition that in all cases, the sources and nature of confidential ‘dob-in’ information must be disclosed pursuant to s 359A(1), absent the exception in s 359A(4)(c) applying. On the face of it the reasoning at [51] and [61] in Kumar suggests otherwise, but there was no detailed reasoning about this issue by the Full Court, other than that contained in [51] and [61]. The words “In this case” at [51] may suggest that the more general proposition in the remainder of [51] and in [61] are qualified by the particular facts of Kumar. It is conceded that this is not clear.

In Kumar, the Minister contended that s 359A(1) provided the necessary flexibility for the Tribunal to take an approach whereby

the Tribunal could disclose the 'gist' of confidential 'dob-in' information without disclosing its source. In other words, s 359A permitted the same flexibility as the common law: see comments of the High Court re the 'problem of confidentiality' in Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 225 CLR 88⁵ where Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ observed:

The appellant submitted that procedural fairness further required that he be given the letter because, if he did not know who had written the letter, one obvious form of answer to the allegations made in it would be denied to him. He could not say that the author of the letter was not to be believed. **That is, he could not attack the credibility of the informer unless he knew who the informer was.**

So much may readily be accepted. But it by no means follows that the tribunal was bound to give the appellant a copy of the letter, or tell him who had sent it, or even tell him that the information had been sent in written form. To give the appellant a copy of the letter or tell him who wrote it would give no significance to the public interest in the proper administration of the Act which, as pointed out earlier, required that those entitled to a visa be granted one and those not entitled be refused. It is in aid of that important public interest that, so far as possible, there should be no impediment to the giving of information to authorities about claims that are made for visas. That public interest, and the need to accord procedural fairness to the appellant, could be accommodated. They were to be accommodated, in this case, by the tribunal telling the appellant what was the substance of the allegations made in the letter and asking him to respond to those allegations. How the allegations had been given to the tribunal was not important. No doubt the appellant's response to the allegations would then have had to be considered by the tribunal in light of the fact that the credibility of the person who made the allegations could not be tested. And that may well leave the tribunal in a position where it could not decide whether the allegations made had substance. But the procedure outlined would be fair to the appellant and it would be a procedure which accommodated what Brennan J described in *Kioa* as the "problem of confidentiality". *[emphasis added]*

⁵(2005) 222 ALR 411; (2005) 80 ALJR 228; (2005) 87 ALD 512; [2005] HCA 72 at [28] – [29].

The emphasised words of 359A(1) provide support for the proposition that s 359A(1) permits the same approach as the common law:

- (1) Subject to subsections (2) and (3), the Tribunal must:
 - (a) give to the applicant, **in the way that the Tribunal considers appropriate in the circumstances**, clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review; and
 - (b) **ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review**, and the consequences of it being relied on in affirming the decision that is under review; and
 - (c) invite the applicant to comment on or respond to it. [emphasis added]

The lack of clarity surrounding the nature and extent of the s 359A(1) obligation in Kumar would permit the Court in this case to conclude that the obligation in s 359A(1) was not breached in this case, because the facts of this case (i.e. the nature of the information and the identity of the informants) permitted the Tribunal to take the course it did and not disclose the identity of the informants.

The Tribunal did not rely upon the information in any event

*Third, and in any event, this is a case where the confidential “dob-in” information was not ultimately taken into account by the Tribunal. This was not the case in Kumar. The Tribunal’s reasoning in this case occurred after the Tribunal had provided a letter to the applicant dated 25 January 2008, informing her of the gist of the information. But ultimately the ‘dob-in’ information was not information that “**the Tribunal considers would be the reason for affirming the decision.**” [emphasis added].*

The applicant’s submission that the obligation in s 359A is “prospective” should be rejected. The High Court did not say that in SZBYR v Minister for Immigration and Citizenship (2007) 235 ALR 609.⁶

⁶ In *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609 at [17] the High Court said: The statutory criterion does not, for example, turn on “the reasoning process of the Tribunal”, or “the Tribunal’s published reasons”. The reason for affirming the decision that is under review is a matter that depends upon the

The language used in s 359A(1) emphasises that the Tribunal must 'consider' the information to be the reason or a part of the reason for affirming the decision under review. Here, at one stage the Tribunal thought the information might be the reason for affirming the decision - and sent a letter to the applicant about the information. However, the duty in s 359A(1) exists if ultimately the Tribunal considers the information is part of the reason at the time of the decision is made. The opinion is a jurisdictional fact upon which the duty is invoked: see SZKLG v Minister for Immigration and Citizenship (2007) 164 FCR 578; [2007] FCAFC 198 at [34]–[36] where the Full Court of the Federal Court confirmed that s 424A (and therefore s 359A) is not limited to compliance before a Tribunal hearing: SZKLG v MIAC (2007) 164 FCR 578. The corollary must be true. If the obligation ceases at any time prior to the handing down of the decision – because the Tribunal no longer considers the information would be the reason for affirming the decision - then there is no breach of the provision.

Section 359A imposes no temporal requirement: SZKLG at [34]. In other words, if, at the time of decision, the Tribunal expressly puts to one side certain information (and the Court is satisfied that it genuinely did so), then the obligation in s 359A(1) is not invoked in relation to that information.

Ground 2 - translation errors

The absence of particulars to this ground suggest that the complaint made by the appellant about the interpretation deficiencies relate to the first limb identified by the Court in Appellant P119 of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2003) FCAFC 230 at [17].⁷

However the appellant's written submissions suggest that both limbs are relied upon. Both limbs are addressed here.

The first limb

The first limb can not be sustained. It is well accepted that a perfect translation/interpretation is not necessary. Interpretation is not merely a mechanical exercise. It is sufficient that the translation is sufficiently accurate so as to convey the idea or

criteria for the making of that decision in the first place. The Tribunal does not operate in a statutory vacuum, and its role is dependent upon the making of administrative decisions upon criteria to be found elsewhere in the Act. The use of the future conditional tense ("would be") rather than the indicative strongly suggests that the operation of s 424A(1)(a) is to be determined in advance - and independently - of the Tribunal's particular reasoning on the facts of the case.

⁷ See at [17] – [37].

concept being communicated: WACO v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 171 at [66].⁸

Whilst there were some examples of imperfect interpretation at the oral hearing, by and large almost all of them were not serious. In almost all cases – with the exception of those expressly referred to in the applicants’ written submissions the idea or meaning of the question was more than adequately conveyed. Imperfect translations and interpretations occur in Courts and Tribunals every day: Appellant P119 of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2003) FCAFC 230 per Mansfield and Selway JJ at [19] - [20].

Indeed, on a number of occasions it is clear that the interpreter acted in a manner which assisted the applicant/s to provide responsive (rather than unresponsive) answers to questions which were not the subject of interpretation errors. The so called examples of “perceptible confusion” referred to at [13] of the applicants’ written submissions do not reveal any ongoing confusion at the hearing at all.⁹ They reveal perfectly normal instances of clarification by the interpreter, occasions where a question is non-responsive (the gist of the question having been conveyed), the Tribunal member ensuring that the question is understood etc. Only one of the examples (the first) involved an error of interpretation and in that case the advisor was aware of the error and addressed the issue at the hearing, and later addressed it in writing: CB 337.

This is a hearing that lasted from 10.10 am in the morning until 4.20pm in the afternoon. In fact, a reading of the whole of the transcript reveals that the standard of interpretation was good, and consistently good throughout the hearing. It would be surprising if a hearing lasting that long did not result in some instances of confusion, instances where questions and answers needed to be clarified, and the odd occasion where a question or answer was misinterpreted. However, this in no way comes close to a situation where the standard of interpretation would draw the Court to the conclusion that “here the standard of interpretation at the Tribunal hearing was so inadequate that the appellant was effectively prevented from giving evidence at the Tribunal” for the purposes of s 360 of the Act: see Appellant P119 at [17]; Singh v Minister for Immigration and Multicultural Affairs (2001) 115 FCR 1 at 6 [27]; Perera v Minister for Immigration and

⁸ See also *Perera* per Kenney J at [25] – [26].

⁹ Other than the first example which is referred to at example 16.1.

Multicultural Affairs (1999) 92 FCR 6 at [38]-[41]; SZGWN v Minister for Immigration and Citizenship [2008] FCA 238.

1. ***The ‘second limb’***

The second limb identified in Appellant P119 of 2002 is not conceded by the Minister to amount to a separate stand alone ‘limb’ or species of jurisdictional error in connection with alleged faulty or bad interpretation at a Tribunal hearing. That limb – if it can be so described - requires demonstration of demonstration of a “material error” of fact resulting in a conclusion that “the decision-making process had occurred”: see Soltanyzand v Minister for Immigration and Multicultural Affairs [2001] FCA 1168 at [18].¹⁰

To vitiate the decision in this way, the applicants are required to demonstrate that the factual error in question amounts to an error of a jurisdictional kind. It requires consideration of the jurisprudence concerning the limited circumstances in which an error of fact can constitute a jurisdictional error.

A mere factual error by the Tribunal will not ground judicial review unless it relates to a jurisdictional fact or is fact or is a manifestation of some error of law, substantive or procedural, which constitutes jurisdictional error and thereby vitiates the purported decision: Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323. Courts should be slow to find that an erroneous finding of fact or an error of reasoning in finding a fact, made in the course of making a decision, demonstrates that an administrative tribunal so misunderstood the question it had to decide that its error constituted a jurisdictional error: Re Minister for Immigration and Multicultural Affairs; Ex parte Cohen (2001) 177 ALR 473; [2001] HCA 10 at [35] per McHugh J.

In NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No 2) (2004) 144 FCR 1 the Full Court said at [53] – [54]:

[53] It is desirable first to restate the uncontroversial proposition that mere factual error by the Tribunal will not ground judicial review unless it relates to a jurisdictional fact or is a manifestation of some error of law, substantive or procedural, which constitutes jurisdictional error and thereby vitiates the purported decision. This is evident from

¹⁰ See *Applicant P119* at [22] “Nor could it be said that the single error that was identified was material to the conclusions reached by the Tribunal”.

the discussion, in *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 of jurisdictional error as a ground for the review of Tribunal decisions under the former Pt 8 of the Migration Act. If the Tribunal identifies a wrong issue or poses the wrong question for itself or does not have regard to relevant material or takes into account irrelevant material, so as to affect the exercise of its powers, error of law and/or jurisdictional error may be identified (at CLR 351–2) per McHugh, Gummow and Hayne JJ). An error of fact in the course of a decision is unlikely to be a jurisdictional error unless the fact is a jurisdictional fact ...

[54] ... Error of law may occur within jurisdiction: *S20/2002* at [57] ... The observations in the joint judgment in *S20/2002* did not offer any clear guidance upon the circumstances in which factual error may amount to jurisdictional error for the purposes of the exercise by the High Court of its constitutional jurisdiction under s 75(v) or the exercise by this court of its analogous statutory jurisdiction under s 39B of the *Judiciary Act*. The comments did, however, indicate that, absent a question of jurisdictional fact, which in itself may be a matter of some complexity involving questions of fact and law, the circumstances in which factual error will amount to or evidence jurisdictional error is likely to be quite limited. *[some citations omitted]*

As the Court held in SZFVL v MIMIA (2005) 223 ALR 747; [2005] FMCA 991 at [36] :

A mere factual error does not establish jurisdictional error unless it is a jurisdictional fact or otherwise a manifestation of error of law amounting to jurisdictional error: *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1; 219 ALR 27; [2004] FCAFC 263 at [53] and ordinarily, there is a distinction between overlooking a single item of evidence and overlooking an element or integer of an applicant's claims. However, a factual error assumes legal significance if the fact is of such fundamental importance as to establish a miscarriage of the fact finding process. The fact then becomes a jurisdictional fact. Likewise, a failure to take into account an item of evidence assumes jurisdictional significance if it is so fundamental to the fact finding exercise that it goes to jurisdiction: *WAFP v Minister for*

Immigration and Multicultural and Indigenous Affairs
[2003] FCAFC 319 at [21].

The submissions of the applicants extract parts of the transcript which reveal some errors of interpretation. For the most part they are relatively minor; and once again, the gist of the information was generally (or ultimately) conveyed by the interpreter.

It appears that only one of these errors found its way into the Findings and Reasons. That error related to the error in connection with whether Mr Kim rented a property in his own name after October 2001: CB 583.4.

This was an error of fact within jurisdiction. It is one incorrect fact in extensive and comprehensive Findings and Reasons running to over 6 pages addressing in meticulous detail all of the mandatory statutory criteria in connection with a spouse visa – after a six hour hearing and consideration of substantial documentary evidence. The error is not so fundamental to the fact finding exercise in the present case that it went to jurisdiction. (Likewise, any other minor factual errors not contained in the Findings and Reasons are so peripheral as to the Tribunal's reasoning and conclusions that they could not be held to amount to errors of a jurisdictional kind.)

In the circumstances of this case the factual error identified does not amount to a jurisdictional error, and the decision is a privative clause decision.

19. In relation to the additional ground of review the Minister relevantly submits:

The applicants contend that this raises a similar issue to that identified in SZILQ v Minister for Immigration & Citizenship (2007) 163 FCR 304; [2007] FCA 942. It is noted that SZILQ was decided on the basis that an entirely new sur place claim was put before the Tribunal for the first time after the matter had been remitted by consent to a differently constituted Tribunal. The appellant sought a new hearing in order to address (inter alia) issues raised by the new conduct which included the appellant's attendance at Hillsong Church services during his detention at Villawood: at [13] – [15] and [32] – [33]). The request for a new hearing was declined and the appellant in SZILQ did not have an opportunity to give evidence to the Tribunal about these matters.

There is no analogy whatsoever between SZILQ and this case. Here, the primary applicant had an opportunity to give evidence

about her work history in Australia. She gave that evidence. The Tribunal subsequently (and properly) raised adverse information before it with her in connection with the evidence she had given: CB 333. The Tribunal was obliged to raise that information, and it did so. The primary applicant responded to this information: CB 341.

The Tribunal was not obliged to conduct a second hearing in relation to this new information. SZILQ has been distinguished in a similar fashion in SZLCT v Minister for Immigration and Citizenship [2008] FCA 890 per Rares J at [24].

SZILQ does not stand for the proposition that there is a positive obligation on the Tribunal to put any and all allegations to an applicant at the oral hearing: SZKMN v Minister for Immigration and Citizenship [2007] FCA 1971 per Flick J at [14].

Consideration

Did the Tribunal breach s.359A of the Migration Act?

20. The decision of the Full Federal Court in *Kumar v Minister for Immigration* has a fundamental impact upon the resolution of this issue. The decision was referred to by counsel both for the Minister and the applicant. The Minister formally submits that *Kumar* was wrongly decided and the High Court has granted special leave for the Minister to appeal against it but, pending any different decision of the High Court, I am bound by the decision of the Full Federal Court. On 10 October 2008 his Honour Besanko J ordered that, until further order, and subject to another order¹¹, the reasons for judgment of the Full Federal Court in *Kumar* not be published. This order presented counsel for the applicant (and this Court) with something of a difficulty in dealing with the decision of the Full Federal Court. I was provided with an expurgated copy of the decision which had removed from it those parts of the decision which, if published, might have negated other non publication orders made by the Federal Court and the High Court in that case. However, there is sufficient in the copy of the decision available to me to satisfy me that the case in *Kumar* was very

¹¹which relieved the Minister and the legal representatives of the appellant in that case and the Tribunal and officers of the High Court of Australia and the Federal Court of Australia from any restraint

similar to this case. The case dealt with the same class of visa and similar factual circumstances. The relevant legal principles were dealt with in the judgment of Besanko J (with whom Tamberlin J and, with one minor qualification, Finn J, agreed) at [50]-[58] and [61]. As in *Kumar*, the information in this case was plainly information requiring disclosure pursuant to s.359A unless it fell within the exception to the obligation relating to non disclosure of information. Relevantly, that is s.359A(4)(c) which provides:

Information and invitation given in writing by Tribunal

(4) *This section does not apply to information:*

(c) *that is non-disclosable information and includes any document containing, any record of, such information or matter.*

21. “Non disclosable information” is defined in s.5(c) as:

information or matter:

(c) *whose disclosure would found an action by a person, other than the Commonwealth, for breach of confidence;*

and includes any document containing, or any record of, such information or matter.

22. Besanko J stated that the words “found an action” in sub paragraph (c) meant “to form the basis of an action” and the decision maker was required to be satisfied that the essential elements of an action for breach of confidence appear to be present. That is a heavy burden to place on members of the review tribunals, who are not required to be lawyers. His Honour also said that, generally speaking, a decision maker would not be required to consider whether there might be defences to an action for breach of confidence, in particular the “clean hands” defence. His Honour stated that the essential elements in an action for breach of confidence were said by Gummow J in *Corrs, Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434 to be:

(1) the information must be capable of being identified with specificity and not merely in global terms;

- (2) the information must have the necessary quality of confidentiality;
 - (3) the information must have been imparted in circumstances importing an obligation of confidence; and
 - (4) there must be an actual or threatened misuse of the information.
23. I dealt with the principles relating to an action for breach of confidence in *Perananthasivam v Telstra Corporation Limited* [2007] FMCA 1261 at [11]:

...

Confidential Information

The principles governing the grant of relief to protect confidential information are set out in the decision of the Court of Appeal in Wright v Gasweld Pty Ltd (1991) 22 NSWLR 317 and are summarised by Megarry J in Coco v AN Clark (Engineers) Ltd (1968) 1A IPR 587, at 590; [1969] RPC 41 at 47. Megarry J considered (1A IPR, at 590) that three elements are normally required if, independently of contract, a case of breach of confidence is to succeed:

First, the information itself ... must "have the necessary quality of confidence about it". Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.

In D & J Constructions Bryson J said, at 124 B-C:

... it must be shown that the information was confidential to the plaintiff when it was communicated, involving the plaintiff in the necessity of showing facts and circumstances which show that it should then have been kept confidential or secret, and necessarily as part of that, what information was so communicated ...

In Corrs Pavey Whiting & Byrne v Collector of Customs (Vic) (1987) 14 FCR 434, at 443, Gummow J regarded it as settled that a plaintiff or applicant must satisfy four criteria to make out a case in equity for the protection of allegedly confidential information:

The plaintiff: (i) must be able to identify with specificity, and not merely in global terms, that which is said to be the information in question; and must also be able to show that (ii) the information has the necessary quality of confidentiality (and is not, for example, common or public knowledge); (iii) the information was received by the defendant in such circumstances as to import an obligation of confidence; and (iv) there is actual or threatened misuse of that information.

In Carindale, Drummond J said, at 315:

... it is a basic requirement that before material will be recognised as having the character of confidential information, the information in question must be identified with precision and not merely in global terms: *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434 at 443 and cf *O'Brien v Komesaroff* (1982) 150 CLR 310 at 327. The requirement is insisted upon even though it may necessitate disclosing to the court the very information the confidentiality of which it is sought to preserve by the action. (emphasis added)

24. I reject the Minister's submission that this case is distinguishable from *Kumar*. In my view, this case is not distinguishable. The question in both cases is whether information received by the Minister's Department and/or the Tribunal was non disclosable on the basis that disclosure of it might found an action for breach of confidence. It is not to the point, in my view, whether this case turns on the availability of the defence of "iniquity". Both cases turn on the application or non application of s.359A(4)(c) as illuminated by s.5(c) in circumstances which are very similar. In the present case, some of the information (which is detailed in the confidential exhibits to the affidavit of Megan Louise Palmer made on 21 November 2008) was volunteered by an anonymous caller. The anonymous information provided some detail about the living arrangements of the applicant and her asserted spouse. The only information which might have been confidential was information about where the informant lived, but the detail of the allegations concerning the applicant's living arrangements could have been disclosed without any breach of confidence occurring. The identity of the informant could not be disclosed because it was not known. The adverse information requiring disclosure pursuant to s.359A was the allegation that Ms Park and Mr Kim lived in different

units in the same block of flats and that they had known each other for less than 12 months. This was not non disclosable information by reason that the disclosure of it might found an action for breach of confidence.

25. The other relevant item of information in the confidential exhibits was the product of a telephone call by an officer of the Department on 20 December 2006 to a person who was known to have had a business relationship with Ms Park. The person gave the officer of the Department certain information concerning their business relationship and an alleged debt. The person also responded to a request by the officer for information about the living arrangements of Ms Park and Mr Kim. The informant confirmed the anonymous information received earlier but went further in relation to Ms Park's relationships with two other men. There is nothing in the record of this conversation to suggest that the officer of the Department offered the person who was asked to provide the information the protection of confidentiality or that confidentiality was sought. Indeed, the person told the officer that she was a creditor of Ms Park and wanted to find her in order to recover her money. In my view, the information obtained from the informant, including the identity of the informant, was not information, the disclosure of which might found an action for breach of confidence because it was not imparted in circumstances importing an obligation of confidence.
26. There was insufficient detail of the information obtained disclosed in the section s.359A letter to meet the obligation of disclosure under that section. The letter simply stated¹²:

On 22 August 2003 and on 20 December 2006 the Department of Immigration and Citizenship was informed by members of the community that your relationship with Mr Kim was contrived for immigration purposes.

This is relevant because it is open to the Tribunal to find that your evidence and Mr Kim's evidence is incorrect. This may lead the Tribunal to conclude that you and Mr Kim are not witnesses of truth. This may also lead the Tribunal to conclude that you and Mr Kim are not in a genuine an continuing spousal relationship

¹²CB334

and decide to affirm the decision not to grant a Partner (Residence) (Class BS) visa.

You are invited to give comments/respond to the above information in writing.

27. The applicant's response to the second s.359A letter suggests that, notwithstanding the failure by the Tribunal to disclose the identity of the second informant and the detail of the information received from that person, the applicant guessed who that person was. The response¹³ includes an assertion that the informant was a former business associate who was motivated by malice and that, further or in the alternative, Ms Park had been defrauded by an individual (who may be a different person) and that there were legal proceedings between them. The Tribunal, perhaps noting that the identity of the second informant had been guessed, said in its reasons¹⁴:

The Tribunal informed the applicants that on 22 August 2003 and 20 December 2006 the Department of Immigration and Citizenship was informed by members of the community that the primary applicant's relationship with the sponsor was contrived for immigration purposes. In a response dated 22 February 2008 the primary applicant submitted that they were probably from a former business associate that she has had a falling out with and someone else with whom she is currently involved in court proceedings. The Tribunal accepts that this may be the case and that they may have had ulterior motives in contacting the Department of Immigration and Citizenship. Accordingly the Tribunal does not give this any weight.

28. The penultimate sentence in the passage quoted above overlooks the fact that, in the second instance, it was the Department which contacted the informant rather than the other way around. Nevertheless, I accept that the Tribunal disregarded the information.
29. I reject the Minister's submission that the obligation of disclosure under s.359A only exists if ultimately the Tribunal considers the information is part of the reason for affirming the decision under review at the time its decision is made. The High Court considered the temporal issue in relation to s.359A in *SZBYR v Minister for*

¹³ CB 342

¹⁴ CB 582

Immigration (2007) 235 ALR 609 at [17]¹⁵. Further, in *MZXBQ v Minister for Immigration* [2008] FCA 319 at [27] his Honour Heerey J considered that the assessment of whether or not information attracted a disclosure obligation at the time it came to the Tribunal's attention would not depend upon the use the Tribunal subsequently made of the information in its reasons. In the light of his Honour's decision, (which is binding upon me) I do not think it is open to me to treat the failure by the Tribunal to provide sufficient particulars of the information in its second s.359A letter as an error of law within jurisdiction on the basis that the Tribunal ultimately gave the information no weight. The failure by the Tribunal to provide sufficient particulars of information was a jurisdictional error¹⁶ notwithstanding that the Tribunal ultimately gave the information no weight.

30. The failure by the Tribunal to provide sufficient particulars of the information deprived the applicant of the opportunity of responding to the detail of the allegations made about her living arrangements and personal relationships. I would not withhold relief in the exercise of discretion for the same reasons as given by the Full Federal Court in *SZIZO* at [97].

Did the Tribunal breach s.360 of the Migration Act because of interpretation errors?

31. The applicant relies upon alleged interpretation errors detailed in the submissions made by her counsel.
32. The issues with regards to the interpretation provided at the hearing were brought to the Tribunal's attention in the context of the response to the second "Invitation to comment on/respond to information". In the letter received in response to the invitation on 25 February 2008 (CB 37) the applicants' representative, after commenting on an error in the interpretation which had led the Tribunal to make an erroneous finding of fact, stated:

This may be attributed to either an incorrect interpretation or erroneous interpretation. This mistake is clearly evident in the audio tape recording of the Hearing. In response to the question

¹⁵ see footnote 6 above

¹⁶ *SZIZO v Minister for Immigration* [2008] FCAFC 122 at [74]-[75]

by the Member if he gave cash to Ms Park, Mr Kim through the interpreter answered, "Initially I give her money when our relationship is not much close enough, I just give her cash if she needed I give some money, but that was our relationship was not that close enough but now it's different". Your section 359A request in turn has deduced from this statement, "At the Hearing Mr Kim gave evidence that he has never given you cash". This is not the correct interpretation. In reality, the couple explained that most of the time, Tae Kwan Kim would give Jung Mee Park cash, and occasionally cheques. The only times he would give Ms Park a cheque is when he worked away from Sydney, say for instance if he worked in Canberra and Gosford. Under such arrangements, he only returned home on weekends. Since the banks were not open on weekends, he would leave cheques and his bank card with Ms Park who would deposit the cheque and withdraw the cash. When he worked in Sydney he would deposit the cheques and withdraw the cash out for himself and he would later give money to Ms Park. He worked in Canberra for about five months. This was consistently some of the misunderstandings at the actual Hearing which would also be attributable to the quality of translation. For instance early on in the Hearing, Ms Park was asked to comment on allegations received by anonymous persons to DIAC that their spouse relationship was not genuine which led to field officers visiting their premises at Hornsby. When she was put the question by the Member, her answers indicated to me even after I made attempts to alert the Member that it appeared from her answers a question put to her by the Member may not have been conveyed properly. Similarly on questions from the Member about her past importing business, the answers she gave about her visa did not answer the Member's question and again showed that there may have been some problems with translation.

33. The applicant asserts that the transcript of the hearing on its face demonstrates a perceptible confusion during the course of the hearing¹⁷.

¹⁷See for example the affidavit of Mira Kim dated 10 October 2008 at annexure B ("the Transcript") at:

- a) page 6 line 26 – page 8;
- b) page 17 line 29 – page 20 line 15;
- c) page 23 line 9 – 31;
- d) page 27 line 29 – 36;
- e) page 28 line 21 -36;
- f) page 39 line 8 – 11;
- g) page 45 line 1 – 40;and
page 47 line 39 – page 48 line 24.

The applicant further asserts that the above in themselves would stand to warrant the allegation of error on the basis of the factors which Kenny J in *Perera v Minister for Immigration* [1999] FCA 507; (1999) 92 FCR 6 said (at 41) should be taken into account in assessing competency of the interpreter. These include:

the responsiveness of the interpreted answers to the questions asked, the coherence of those answers, the consistency of one answer with another and the rest of the case sought to be made and, more generally, any evident confusion in exchanges between the Tribunal and the interpreter ...

34. The Tribunal was put on notice of this alleged inadequacy in the course of the hearing. The statutory obligation under s.360 to "invite" the applicants to appear before it to give evidence and present arguments lay with the Tribunal. It is a continuing obligation: *Applicant NAAF of 2002 v Minister for Immigration* (2004) 221 CLR 1 at [26]-[27]. The applicant contends that, being on notice of the potential errors in the interpretation the Tribunal should have extended an invitation to the applicant to attend a further hearing so that she could give evidence, with better interpretation. The failure by the applicant to ask for a further hearing did not affect that obligation if it existed. See *SZGWN v Minister for Immigration* [2008] FCA 238 at [47].
35. Appearing at Annexure C to the affidavit of Mira Kim dated 10 October 2008 is a report of the accuracy of the Korean – English interpretation provided at the hearing ("the accuracy report"). When the Transcript and the accuracy report are amalgamated and analysed the following excerpts of the hearing record are said by the applicant to exhibit instances where error in translation has caused noticeable confusion in the evidence regarding:
 - a) the visit by the Department of Immigration to the applicant's home;
 - b) accommodation in October 2001;
 - c) the sponsor, Mr Kim's, income;
 - d) Mr Kim's rental of any properties in his name; and
 - e) the couple's financial arrangements.

(1) Visit by the Department of Immigration to the applicant's home

THE TRIBUNAL: ... Now have you read the department's decision?

THE INTERPRETER: Yes, I did.

THE TRIBUNAL: Do you wish to comment on anything in that decision?

THE INTERPRETER: Yes, I do.

THE TRIBUNAL: What would you like to say?

THE INTERPRETER: When I saw the letter I found they say only the bad thing about us. They never mentioned any good thing about us.

THE TRIBUNAL: When you give your answers can you pause regularly to give the interpreter the chance to translate what you are saying. Now in the department's decision the delegate who made the decision refers to information that was received by the department which led them to visiting your home. Is there anything you would like to say about that?

THE INTERPRETER (BACK TRANSLATION): According to the information provided by the department of immigration, eh, (it) was about the circumstance when the department of immigration visited your home. Do you perhaps have anything to say about that?

THE INTERPRETER: Yes, I do.

THE TRIBUNAL: What would you like to tell me?

THE INTERPRETER: When they visited my place I was on first floor and, member, I should make this clear, she said first floor in Korean but from the cultural difference when we say first floor it means in Korea is actually ground floor in Australia. Koreans are more like American style. So they use from first floor ground floor. So when we say first floor in Korean, that means sometimes ground floor.

THE TRIBUNAL: Okay.

THE INTERPRETER: You understand?

MR X: Can I also just cut in, member, because I don't think the applicant understood your question, whether she wanted to comment on the poison pen letter?

THE TRIBUNAL: Let me interpreter translate what she says before

THE INTERPRETER: I was on first floor with my husband and at about 11 o'clock in the morning. So when I was wake up and at that time in my room there was some of my undies, like slip or things like that but they never mentioned about that in that information.

MR X: Senior member, it's quite obvious that she didn't quite understand your question.

THE TRIBUNAL: Okay. Did you have any problems understanding what the question was?

MR X: She must understand that somebody wrote a letter to the department saying - - -

THE TRIBUNAL: That is not what I said.

THE INTERPRETER: No, I can understand.

THE TRIBUNAL: You can or you can't?

THE INTERPRETER: Yes, I can.

THE TRIBUNAL: Okay. Let me just repeat the question. The department visited your home?

THE INTERPRETER: Yes.

THE TRIBUNAL: As a result of some information received by the department.

THE INTERPRETER (BACK TRANSLATION): (They) visited your home as a result of some information received by the department of immigration.

Do you want to make any comment about that?

THE INTERPRETER (BACK TRANSLATION): In other words when you received the letter from the department of immigration, they provided the information to this time (to you) as a result of their visit, right?

COMMENT: After interpreting “As a result of some information received by the department” literally, the interpreter rephrased what he had said just before but in a significantly different way as shown in the back translation provided above when he was supposed to interpret “Do you want to make any comment about that?”

THE INTERPRETER: When I received the letter from the department I was in overseas.

THE TRIBUNAL: Did you subsequently read the decision or have somebody read it to you?

THE INTERPRETER: My husband read through it. Initially we were called by the former representative, I mean the former migrant agent. My agent called our place and then we received the letter from the department and then my husband eventually read through the letter. At the time I was in Korea. I was called by my husband.

MR X: Sorry, member, I hate to harp on the same point but I don't think she quite understands and I think it is a relevant point.

THE TRIBUNAL: I asked you earlier whether you had read the decision and you answered yes. Did you in fact read the decision or did you have somebody read the decision to you?

THE INTERPRETER: Since I can't understand English well someone else, which is my son, read it.

THE TRIBUNAL: Your son read it to you?

THE INTERPRETER: Yes. He read it and then subsequently my current representative also read it.

THE TRIBUNAL: Earlier on you said to me they only mentioned the bad things and not the good things.

THE INTERPRETER: Yes.

THE TRIBUNAL: Is there anything you want to say about what you call the bad things in the decision?

THE INTERPRETER: My son read the decision instead of me and he told me in the letter there is only one pillow and it was single bed and there isn't any my in that room.

THE TRIBUNAL: Do you want to say anything about that?

THE INTERPRETER: I want to say that there were two pillows in the bedroom and that there were my underwear, like the slip and things like that and I put some bits and pieces for needed for my sleeping because I used that place for sleeping, only for sleeping.

THE TRIBUNAL: Is there anything else you wish to say about that decision?

THE INTERPRETER: Not at the moment.

(2) Accommodation in October 2001

THE TRIBUNAL: Now where were you living when you met him for the first time?

THE INTERPRETER: In Lyons Street, Strathfield.

THE TRIBUNAL: And where was he living?

THE INTERPRETER: I remember he lived in Campsie.

THE TRIBUNAL: When did the two of you start living together as a couple?

THE INTERPRETER: I think October, around October 2001. He packed his baggage and moved to my place. He hardly go back to his place since then.

THE TRIBUNAL: So did he continue to have his own place?

THE INTERPRETER: As far as I know since he has been a mobile service, so he days, so Campsie is a kind of a base for his mobility. So at that place he stored some parts like tyres or things like that.

THE TRIBUNAL: For how long did he have a separate residence from you? For how long did he have – you said he moved in to your house in October 2001. For how long after that did he have his own separate house or unit? His own house separate from you.

THE INTERPRETER (BACK TRANSLATION): You said that he moved into your house in October 2001, right? For how long, eh, he owned his house, right, and how long did he not go to the house?

THE INTERPRETER: He probably moved out because his place lived with his employee and his brother. So he only go back to place only if he working.

THE TRIBUNAL: So is he still renting a place in Campsie?

THE INTERPRETER: I think she didn't quite answer the question. So I should clarify the question.

THE TRIBUNAL: Just translate what she just said to you.

THE INTERPRETER: Because I am not quite sure whether she changed the subject as to whether he or himself.

THE TRIBUNAL: I need you to listen carefully. Please listen very carefully to the question. If you don't understand the question tell me. When you answer please just answer the question. Is Mr Kim still renting a place in Campsie?

THE INTERPRETER: No.

THE TRIBUNAL: When did he stop renting that?

THE INTERPRETER: I think he moved December 2002 because he moved his base to other place. Somewhere a Caltex gas station.

THE TRIBUNAL: Since December 2002 has Mr Kim rented any other premises for living?

THE INTERPRETER: in Campsie. It is for business purposes.

THE TRIBUNAL: When was that?

THE INTERPRETER: I remember, I am not quite so sure but I remember March or April in 2003 he began he conduct his business. At that time he got two businesses.

THE TRIBUNAL: You have given me a long answer but you still haven't answered the question I asked you. Please listen to the question and answer the question.

MS PARK: Yes.

THE TRIBUNAL: Since December 2002 has Mr Kim rented any property for living?

THE INTERPRETER: No.

THE TRIBUNAL: Since when has he lived with you on a permanent basis? Has he lived with you on a permanent basis?

THE INTERPRETER: Yes.

THE TRIBUNAL: Since when?

THE INTERPRETER: Around October 2001.

THE TRIBUNAL: Has he lived anywhere else since October 2001?

THE INTERPRETER: Yes.

THE TRIBUNAL: Where else has he lived?

THE INTERPRETER: I should say no because when she say means no. He – she understands the question, the question is just starting with negative, right. He never lived another place, yes. In Korean means it's no. So she agree with the question.

THE TRIBUNAL: All right. Let me ask the question again.

THE INTERPRETER: Sorry.

THE TRIBUNAL: Has Mr Kim lived anywhere other than with you, anywhere else other than with you since October 2001?

THE INTERPRETER: No. Only the exception of the Campsie, is the place for mobile services. Other than that, no.

THE TRIBUNAL: Has Mr Kim rented any living accommodation other than Campsie since October 2001?

THE INTERPRETER: He rent under his name a place for his friend whose visa stated was not clear.

MS PARK (LITERAL TRANSLATION): Well, there might be one case that he lent his name for someone who couldn't rent (a house or unit) because of (his) visa. Maybe it was when (we) lived in Homebush, anyway, (he) lent (his name) once, as far as I know, he lent his name once, I think. He did not live (there) but I think I heard that he did it for a friend who had a visa problem.

COMMENT: Ms Park's response was not fully interpreted. As a consequence, the original interpreting did not convey uncertainty embedded in Ms Park's Korean response.

THE TRIBUNAL: I'm sorry, for his friend?

THE INTERPRETER: Yes, he simply just rent a place but not for his living but his friend's living. His friend is not – his visa status is not eligible to rent from our place.

MS PARK (LITERAL TRANSLATION): Once I heard, I think... I think heard once.

COMMENT: Ms Park added the part above but it was not interpreted.

THE TRIBUNAL: Why doesn't his friend's visa allow him to rent a place?

THE INTERPRETER: I do not know exactly because it is Mr Kim's friends and I don't know what happened with his visa status either.

THE TRIBUNAL: Where did he rent this place and when?

THE INTERPRETER: Maybe in 2003 because I heard that when I lived in Homebush. Didn't tell me exactly because I don't like borrowing his name or any name for anybody.

COMMENT: Ms Park said that she does not like "lending" names rather than "borrowing". The same mistake appears again in Page 20 Line 15.

THE TRIBUNAL: Where was the place?

END OF TAPE ONE SIDE B (1B)

BEGINNING OF TAPE TWO SIDE A (2A)

THE INTERPRETER: He didn't tell me exactly what the situation was but I think somewhere in Homebush because all his friends living around that area at that time.

THE TRIBUNAL: Has he rented any other properties in his name since October 2001?

THE INTERPRETER: Not to my knowledge. He didn't tell me in detail about borrowing his name for his friend's accommodation renting.

(3) Mr Kim's Income

THE TRIBUNAL: Now is Mr Kim currently working?

THE INTERPRETER: Yes.

THE TRIBUNAL: Where is he working?

THE INTERPRETER: In Canberra. It's about two weeks by now.

THE TRIBUNAL: So where does he live?

THE INTERPRETER: Bungador, his company, his employer rented a place for the employees.

THE TRIBUNAL: What does he do there?

THE INTERPRETER: Tiler.

THE TRIBUNAL: How long has he been doing that?

THE INTERPRETER: He started September 2003.

THE TRIBUNAL: So is this job in Canberra a temporary job or permanent?

THE INTERPRETER: It's a temporary one. Maybe three months.

THE TRIBUNAL: What is his current income?

THE INTERPRETER: Do you mean clear or lump sum?

THE TRIBUNAL: Clear?

THE INTERPRETER: Weekly?

THE TRIBUNAL: Whatever is easier?

THE INTERPRETER: For fortnightly he should be paid around \$3,000 but he deduct some money for his own usage and I received around \$2,500.

THE TRIBUNAL: What was his doing prior to becoming a tiler in 2003?

THE INTERPRETER: The car service, car repair service. At that time he rented a shop for car repair, next to a gas station.

THE TRIBUNAL: Do you have any joint bank accounts with Mr Kim?

THE INTERPRETER: Yes, I do.

THE TRIBUNAL: Where do you have those accounts?

THE INTERPRETER: Do you mean which banks?

THE TRIBUNAL: Yes, which banks?

THE INTERPRETER: Commonwealth Bank.

THE TRIBUNAL: When did you open that account?

THE INTERPRETER: In year 2003.

THE TRIBUNAL: Is that the only joint bank account you have?

THE INTERPRETER: Yes, that's the only one other than my husband's just single name account but the joint account is only one.

MS PARK (LITERAL TRANSLATION): There are (other accounts) in my husband's name, yeah. Although I have (the key) card(s) of (the accounts), there are accounts in my husband's name but there is only one in both our names.

COMMENT: The highlighted part of Ms Park's response was not interpreted. It is not clear from her response whether her husband has multiple accounts or a single account in his name as Korean does not always specify whether a noun is a single or plural.

THE TRIBUNAL: Do you have a bank account in your name as well?

THE INTERPRETER: Yes, I do.

THE TRIBUNAL: Which bank is that with?

THE INTERPRETER: ANZ Bank.

THE TRIBUNAL: Where is his single account?

THE INTERPRETER: You mean the branch?

THE TRIBUNAL: Which bank?

THE INTERPRETER: ANZ.

THE TRIBUNAL: His is in the ANZ as well as yours?

THE INTERPRETER: I am sorry for that. ANZ as well because I got the keycard for his single account.

THE TRIBUNAL: Tell me how you and Mr Kim operate this joint account?

THE INTERPRETER: Whenever there is cash from him or when he receive a cheque for his wage and I normally put the money into the account. Sometimes but I haven't used that joint account very frequently and I believe his – there are a couple more of his account, some account under Bendigo Bank.

MS PARK (LITERAL TRANSLATION): Now, well, every time, when (he) gave me some cash (see COMMENT below) when he receives a cheque some times, I put it in the account. By the way, we have used the account quite recently. In the past, he withdrew money from his account and gave me money. And he has a card of Bandigo something bank as well and as far as I know he has a couple of bank accounts in his name.**

COMMENT: Ms Park's utterances underlined were not fully interpreted and the interpreted part is a misinterpreting.

** This part is recorded as "whenever there is a cash from him" in the transcript but this is what the interpreter actually said.*

*** Ms Park didn't finish her sentence but started another one.*

THE TRIBUNAL: He has an account in Bendigo Bank?

THE INTERPRETER: Yes, that is my knowledge.

THE TRIBUNAL: How do you manage your finances, the two of you? What is the normal arrangement?

THE INTERPRETER: Once I received the money from my husband and then I pay rent and pay all the bills and I use them on my living expenses. If I have some shortfall in my living expenses then sometimes I brought some money from Korea. Since I have worked in Korea, I got some money over there. So if I need some money here then I brought from overseas.

THE TRIBUNAL: Do you pay all the bills?

THE INTERPRETER (BACK TRANSLATION): You don't have any problem in paying all the bills, right?

THE INTERPRETER: Yes, I do.

THE TRIBUNAL: Do you and Mr Kim have any assets in joint names?

THE INTERPRETER: No, we don't have any joint name ourselves but we have joint name in Medicare. Medibank, private insurance, health insurance.

THE TRIBUNAL: We have a lot that we still need to go through. I also have a number of witnesses who are waiting outside. It would really assist me and you if you would just answer the question.

THE INTERPRETER: Yes, I do. I apologise.

(4) Mr Kim's Rental of any Properties in his Name

THE TRIBUNAL: Now have you rented any properties in your name since you moved in with her in October 2001?

THE INTERPRETER (BACK TRANSLATION): Have you rented a place to live in your name since October 2001?

MR KIM (LITERAL TRANSLATION): A place to live?

THE INTERPRETER (LITERAL TRANSLATION): Yes.

MR KIM (LITERAL TRANSLATION): Then no.

COMMENT: THE Tribunal asked if he had rented "any properties" but the interpreter added a place "to live". So Mr Kim confirmed with the interpreter if it was "a place to live" and the interpreter said, "Yes". (The exchange between Mr Kim and the interpreter was not interpreted and is not recorded in the transcript.) And then Mr Kim said, "Then, no."

THE INTERPRETER: No.

THE TRIBUNAL: Are you sure about that? Yes?

MR KIM: Yes.

THE INTERPRETER: unit 188 and unit number 56 and then number 55, continuously. Under me and Mrs Park's name.

THE TRIBUNAL: The leases were in joint names?

MR KIM: That's right. The leases were in joint names.

THE TRIBUNAL: Now have you lived anywhere else other than Ms Park since October 2001?

THE INTERPRETER: No, not a separate place.

THE TRIBUNAL: Now when did you meet Yung Huan? When did you meet Ms Park's son for the first time?

THE INTERPRETER: End of July, moved to new place. I helped her moving.

THE TRIBUNAL: Sorry. You said at the end of July you moved to a new place and she moved?

THE INTERPRETER: She moved to a new place. I helped her moving.

THE TRIBUNAL: That's when you first met her son?

MR KIM: Yes.

MR KIM (LITERAL TRANSLATION): I think so as far as I remember.

COMMENT: Mr Kim added "I think so as far as I remember". But it was not interpreted.

(5) Financial Arrangements

THE TRIBUNAL: Do you have any joint bank accounts with Ms Park?

THE INTERPRETER: One in Commonwealth Bank.

THE TRIBUNAL: Do you have any accounts in your name only?

THE INTERPRETER: I have got two.

THE TRIBUNAL: Where are they?

THE INTERPRETER: One ANZ, the other is Bendigo.

THE TRIBUNAL: Does Ms Park have any bank accounts in her name?

THE INTERPRETER: Yes.

THE TRIBUNAL: Which bank is that?

THE INTERPRETER: ANZ.

THE TRIBUNAL: Now can you tell me how you operate your joint account at the Commonwealth Bank?

THE INTERPRETER: Mrs Park manage the account. When I receive a wage I put it in joint account and from that account we pay rent, other bills and if I receive cheque I put it in my ANZ Bank account and then since Mrs Park has got the keycard for my bank account, she withdraw money and then the joint account.

MR KIM (LITERAL TRANSLATION): Well, my wage comes in, right? Now when it comes in, all the bills including rent will be paid out of it. Then the rest is deposited. As, sometimes, I receive it with a cheque, my wife has my ANZ account (key)card. From the account, she withdraws money when she pays rent. Sometimes she puts some cheques into the Commonwealth account and other cheques into the ANZ account. Like this, she manages everything.

COMMENT: Mr Kim's referred to Ms Park as my wife not as Mrs Park. The last utterance of Mr Kim was not interpreted.

THE TRIBUNAL: So does all your wages go into the Commonwealth Bank account?

THE INTERPRETER: It depends. Sometimes joint account, sometimes my own account, the ANZ Bank.

THE TRIBUNAL: Do you ever just give her money direct rather than through the accounts?

THE INTERPRETER: Sorry?

THE TRIBUNAL: Do you ever give Ms Park money direct to her rather than putting it through the accounts?

THE INTERPRETER: Give her cash?

THE TRIBUNAL: Yes.

THE INTERPRETER: No. Initially I keep money when our relationship was not that much close enough. I just keep the cash and then if she needed I give some money but that was when our relationship was not that personal but now it's different.

The Tribunal's record of the evidence given at hearing

36. Relevant to the above excerpts, under the heading "Claims and Evidence" and "Findings and Reasons" the Tribunal went on to represent the evidence given at the hearing as follows [NB. emphasis added by counsel for the applicant throughout in an attempt to highlight the representations of evidence which are allegedly erroneous and/or misconstrued]:

(2) Accommodation in October 2001 (CB 570 - 571)

When she first met Mr Kim he was living at Campsie and she was living at Lyon Street, Strathfield. In October 2001 Mr Kim moved into her place and he hardly went back to his place since then. He continued to have his own place. As he was doing his mobile service he needed a base somewhere to store parts. He used Campsie as his base. He lived with his brother and his employee at Campsie and only went there when he was working. He is no longer renting a place at Campsie.

*Mr Kim moved out of the Campsie residence in December 2002 because he moved his base to a Caltex Service Station. **When asked whether Mr Kim rented any other residential property since December 2002 she stated that he operated a karaoke business in Campsie. He began the Karaoke business in March or April 2003. At that time he had two businesses. Mr Kim did not rent any other residential property since December 2002 and lived with her on a permanent basis since October 2001.***

When asked whether Mr Kim lived anywhere else since October 2001 she stated that he did. When asked whether Mr Kim lived anywhere else other than with her since October 2001 she stated only at Campsie. Since 2001 Mr Kim has rented a place for his friend in his name. His friend was not eligible under his visa to rent a place. When asked why she stated that she did not know exactly because he is Mr Kim's friend. She did not know what happened.

*When asked when she and where he rented this place, she stated that it may have been in 2003 because she heard about it when she was living in Homebush. **Mr Kim did not tell her the details because she did not like him “borrowing his name for anybody” he did not tell her exactly but she thinks it was somewhere in Homebush. She was not aware of whether he had rented any other properties in his name since October 2001. He did not tell her.***

(3) Mr Kim’s income (CB 571)

*She and Mr Kim have a joint bank account at the Commonwealth Bank of Australia. That account was opened in 2003. That is the only joint bank account they have. She and Mr Kim also have individual bank accounts. Her account is at the Australia Bank and his was at the Bendigo Bank. She has a key card for his account. **When she receives cash from Mr Kim or when he receives cheque for his wages, she puts the money in the account. She does not use the joint account much.***

*When she receives money from Mr Kim she pays the rent, the bills and her living expenses. If there is a short fall in the living expenses, she gets money sent over from Korea. She worked in Korea and has some money over there. **She pays all the bills.** She and Mr Kim do not own any joint assets. Their joint names are in Medicare. They do not have any joint debts. She owns a car in her name. This car was purchased in 2002. Mr Kim bought the car for her in a car auction. She does not have any debts in her name only. As far as she knows Mr Kim does not own assets in his name. **She does not know whether he has any debts in his name.** She does not have an independent source of income.*

(4) Mr Kim’s rental of any properties in his name (CB 574)

*...they have lived together since October 2001. They started living together at Lyon Street, Strathfield. The unit was rented in his name and Ms Park’s name. They have lived together continuously since then. **He has not rented any properties in his name since he moved in with Ms Park in October 2001. He is sure about that.** He has not lived anywhere else other than with Ms Park since October 2001.*

(5) Financial arrangements

(CB 574)

Ms Park normally manages their account. When he received his wages they put it in the joint account. From that account they pay their bills. If he receives a cheque he deposits it into his ANZ bank account. Ms Park has a keycard for his account and she withdraws money. His wages are sometimes paid into the Commonwealth Bank of Australia account and sometimes paid into the ANZ Bank account. He has never given Ms Park cash. Initially when their relationship was not very close, he kept the money and he gave her cash if she needed it. It is different now.

(CB 579)

The primary applicant and the sponsor have separate individual bank accounts. They also have a joint bank account at the Commonwealth Bank of Australia. The primary applicant gave evidence that she does not use the joint account much. She also gave evidence that she usually pays the bills. The sponsor gave evidence that their bills were paid from the joint bank account. In response to the letter to the Tribunal pursuant to section 359A of the Act the primary applicant stated that she was responsible for paying all the bills using either her own account or the sponsor's account and that the sponsor did not know about any bill payments from which accounts they were paid. She stated that she paid the bills mainly at the post office in cash. She has never paid any bills through B-Pay and she does not know how it works and through any other electronic means. The Tribunal does not accept this explanation. The Tribunal would expect that if the primary applicant paid all the bills and the sponsor did not know which account they were paid from he could have said so at the hearing.

The primary applicant has provided to the Tribunal copies of bank statements for their joint account period 1 November 2004 to 31 January 2008. These statements indicate a large number of frequent withdrawals at the Hornsby RSL Club between 1 November 2004 and March 2006 and from the Epping Club between April 2006 and January 2008. They also indicate the payment of rent by B-Pay from this account between November 2004 and January 2008. The statements do not indicate that any other liabilities are directly paid from this account. The statements are inconsistent with the primary applicant's response that she paid all the bills and that she never paid any bills by B-Pay.

The nature of the persons' commitment to each other (CB 581)

*The primary applicant gave evidence that when she first met the sponsor he was living at Campsie and she was living at Strathfield. In October 2001 the sponsor moved into her place and he hardly went back to his place. However he continued to have his own place until he moved out of the Campsie residence in December 2002. **The sponsor gave evidence that he did not rent any property in his name after he moved in with the primary applicant in October 2001.** In response to a letter from the Tribunal written pursuant to section 359A of the Act the primary applicant stated that the property of the sponsor lived in at Campsie was rented in his name. **When he moved in with her in October 2001 he did not terminate the lease because his friend was living in the property until December 2002.** The Tribunal does not accept this explanation. The Tribunal would expect that if the sponsor was no longer living in that residence he would have made arrangements to transfer the lease to the name of lessee so that he was no longer responsible for the payment of the rent on that property.*

37. I reject the applicant's contention that the standard of interpretation at the Tribunal hearing was so bad that the applicant and her witnesses were prevented from giving their evidence effectively or at all. I accept the Minister's submissions that the standard of interpretation at the hearing was sufficient to convey generally the ideas or concepts being communicated. The real question is whether any of the identified errors in interpretation demonstrates a "material error" of fact resulting in a miscarriage of the decision making process. I agree with the Minister's submissions that for the most part the errors of interpretation identified were relatively minor. The general sense of what the applicant and her witnesses were saying was conveyed by the interpreter. I also accept the Minister's submission that only one of those errors found its way into the Tribunal's reasons in any substantive way, that being the error in connection with whether Mr Kim rented a property in his own name after October 2001¹⁸. That error had some bearing upon the Tribunal's adverse credibility finding in relation to Mr Kim but it was only one of a number of issues bearing upon the credibility assessment of Mr Kim and perhaps more importantly, the applicant. The Tribunal concluded¹⁹:

¹⁸ CB 583.4

¹⁹ CB 582-583

When considering the evidence as a whole the Tribunal finds that there are a number of inconsistencies and contradictions in the evidence given by the primary applicant and the witnesses at hearing as well as between the oral evidence given at the hearing and the documentary evidence submitted to both the Department of Immigration and Citizenship and the Tribunal. These inconsistencies and contradictions raise serious concerns in relation to the credibility of both the applicants and the sponsor. The primary applicant has attempted to explain some of these inconsistencies in her responses to letters written by the Tribunal pursuant to section 359A of the Act. The Tribunal has difficulty accepting the explanations particularly where they contradict the documentary evidence.

When the Tribunal asked the primary applicant to comment on the Decision Record from the Department of Immigration and Citizenship dated 25 January 2007 her response was limited to “they say only the bad things about us. They never mention any good thing about us.” She also stated that when the Departmental officers visited her home she was on the first floor with the sponsor, that there were two pillows in the bedroom as well as her underwear and “some bits and pieces for sleeping” that the Departmental officers failed to mention.

the inconsistencies and contradictions in the evidence such as the inconsistencies between when the primary applicant and the sponsor say they met for the first time and the lease in both their names being dated prior to their meeting, the inconsistencies in the evidence given by the primary applicant and the sponsor in relation to how much the sponsor earned, which bank account their bills were paid from, whether or not the sponsor rented any properties in his name after October 2001, the inconsistencies in the evidence given by the primary applicant and the sponsor at hearing in relation to where they lived in 2003 and the documents provided by the sponsor to the Department of Immigration and Citizenship in relation to his residential address in 2003, the inconsistencies in the evidence given by the primary applicant and the sponsor on the one hand and the witness, Mr Hyun Suk Chung, on the other, in relation to where they lived in 2004, the primary applicant’s lack of knowledge of important aspects of the sponsor’s life and the lack of companionship and emotional support that the primary applicant and the sponsor drawn from each other lead the Tribunal to form the view that the relationship between the primary applicant and the sponsor is not genuine and continuing and that it has been contrived for immigration purposes.

38. I accept the Minister's submission that the error was not so fundamental to the fact finding exercise in this case that it went to jurisdiction.
39. I reject this ground of review.

Did the Tribunal breach s.360 of the Migration Act by failing to put to the applicant at the Tribunal hearing the material contained in the confidential exhibits to Ms Palmer's affidavit?

40. The information obtained by the Minister's Department was received anonymously on 22 August 2003 and in response to an oral request on 20 December 2006. The information went to the applicant's living arrangements and personal relationships and her employment history. That was prior to the decision of the Minister's delegate made on 25 January 2007. The decision record of the delegate²⁰ contained the following:

On 20 April 2005, DIMA received notification of allegations of a contrived relationship (folio 169). A subsequent case summary by the Bona Fides Unit on 28 April 2005, recommended conducting a home visit and bona fides interview to test these allegations. (folios 170-172).

On 26 September 2005, a home visit was conducted by Fraud Analysis Unit officers, Elizabeth Pettit and Yvonne O'Callaghan, to the unit complex located at 121-133 Pacific Hwy, Hornsby. The DIMA officers inspected two separate units (21 & 55) in the complex. The home visit report, at folios 174-177, raised further serious concerns about the genuineness of the relationship.

The departmental officers who visited the Hornsby addresses on 26 September 2005 inspected both units 21 and 55 of the complex. Both units were leased by the couple jointly, beginning in the early months of 2005. the report concludes that the one-bedroom Unit 21 contained most of Mr Kim's belongings, and contained one bed pushed into the far corner, suggesting that it may only be used by one person. The two-bedroom Unit 55 contained the belongings of Ms Park and the secondary applicant. The DIMA officers did not locate any evidence that the sponsor resided in Unit 55. There was only one letter found in

²⁰ CB 254

Unit 55, from a superannuation fund, addressed to the sponsor at that address.

The departmental officers concluded that the applicant was in a relationship with Ms Vu, that they both lived at the Burwood address, and that the applicant received some mail at the Cabramatta address which was later forwarded to him at the Burwood address.

The couple were subsequently formally interviewed by the two same DIMA FAU officers, on 14 December 2005. The full transcripts of these interviews are located at folios 1-108 of file CLF2007/12903. Both persons provided conflicting and contradictory answers about how they initially met, the formation and the genuineness of the spouse relationship, and their living & financial arrangements in recent years. There were several notable discrepancies in several of the answers provided.

A subsequent DIMA file note, written by Elizabeth PETTIT, and dated 20 December 2006, concluded, amongst other findings, that ... "I do not believe that they were living together in a genuine and continuing relationship for 12 months before the application was lodged...." and "Their poor knowledge of their own relationship and situation leaves me with strong doubts as to whether they have ever lived together as husband and wife" and "The information the sponsor and applicant have supplied in the application...as well as their answers at interview, do not appear to support the assertion made by the couple that they have resided together since October 2001" and "Just how inconsistent they were is an indicator that they are not a genuine couple." Minute at folios 122-128.

Taking into account all the information before me, I am not satisfied that the applicant and sponsor are in a genuine spouse relationship.

41. The obligation on the Tribunal at a hearing is to provide an applicant with the opportunity to deal with the essential and significant matters on which the review will turn²¹. I accept the Minister's submission that this case can be distinguished from *SZILQ*. The essential and significant issues had been identified in the record of the delegate's decision and the information disclosed by the second informant did not give rise to any additional issue. It is true that the applicant was asked questions at the Tribunal hearing about her employment in Australia

²¹*SZBEL v Minister for Immigration* (2006) 228 CLR 152 at [33]-[35]

and that her answers and her response to the second s.359A invitation were used against her. However, I do not accept the applicant's assertion that the reference in the Tribunal's reasons to the "records of the Department" in relation to the applicant's employment history was a reference to the information disclosed by the second informant which the Tribunal expressly stated was not given any weight. In any event, the Tribunal was entitled to, and did, test the credibility of the applicant in relation to her employment history and that was but one of a number of aspects of evidence going to her credibility. The applicant had the opportunity to respond to the Tribunal's questions about her employment history and that was, in my view, a sufficient opportunity to address the Tribunal's concerns.

- 42. I reject this ground in the application.
- 43. In view of the breach of s.359A of the Migration Act, the applicant should receive relief in the form of the constitutional writs of certiorari and mandamus. I will so order.
- 44. I will hear the parties as to costs.

I certify that the preceding forty-four (44) paragraphs are a true copy of the reasons for judgment of Driver FM

Associate:

Date: 12 February 2009